

USING JUDICIAL REFERENCE

Michael P. Carbone*

When drafting agreements, business lawyers will often provide for alternative dispute resolution ("ADR"). Typically there will be a provision for binding arbitration of any disputes that may arise from the agreement. The lawyer may also include a clause requiring the parties to submit disputes to mediation before initiating arbitration. Some lawyers, however, dislike arbitration and therefore may not provide for ADR. Many concerns have been voiced, and the most frequent objections seem to be that the arbitrator is not required to follow the law¹ and that there is virtually no judicial review. But rather than forego ADR altogether, lawyers who object to arbitration should instead consider judicial reference.

Judicial reference (or "reference") operates within the court system. Once a lawsuit has been filed, the court appoints a referee to hear the case or otherwise assist in handling it. Referees are subordinate judicial officers. As such they are required to follow the law, and their decisions, unlike those of arbitrators, are subject to judicial review.²

Some kinds of reference (referred to as a "consensual reference") require the agreement of the parties while others do not. A general reference authorizes the referee to hear the entire case; a special reference is limited to specific issues. A consensual general reference can serve as an alternative to binding contractual arbitration. Special references, on the other hand, do not generally result in a binding decision by the referee.

Before deciding to use judicial reference, counsel should understand how it compares to arbitration and should also be familiar with the various kinds of reference that a court can make. This article begins by focusing on consensual general reference, which is normally provided by contract. It then turns to the other forms of reference that become available after litigation has commenced and that do not require a prior agreement.

Consensual General Reference

Judicial reference is made under the authority of Code of Civil Procedure section 638 or section 639.³ Section 638 provides for general reference and section 639 provides for special reference. In a general reference, the referee will decide all issues of fact and law, and his or her decision will stand as the decision of the court. Judgment may be entered thereon, and the judgment may be reviewed on appeal in the same manner as if it had been made by the court.⁴ The parties may jointly agree to a general reference either pre-dispute or post-dispute.

¹ See *Moncharsh v. Heily & Blasé* (1992) 3 Cal. 4th 1, 6.

² Code of Civil Procedure §645. There is no such creature as a "binding arbitration with a right to appeal." *National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal. App. 4th 709, 715, citing *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 Cal. App. 4th 631.

³ Courts may not order a reference except as authorized by statute. Other statutes authorize the use of referees in particular kinds of cases. See, for example, Code of Civil Procedure §§ 873.010 *et seq.* regarding the partition of real property.

⁴ Code of Civil Procedure §644, 645.

General Reference Compared to Arbitration

Consensual general reference and contractual arbitration both require that the entire case be tried outside of the normal processes of litigation. However, before a lawyer chooses between contractual arbitration and general reference it is necessary to understand both the similarities and the differences between the two.

Both processes offer convenience, privacy⁵ and the opportunity to choose a decision maker with expertise in the subject matter. Jury trials are avoided. The process should normally be speedier and less expensive than litigation. However, the speed and economy depend upon how the process is conducted. Arbitrators and referees are paid by the parties. Some parties and neutrals allow ADR to be turned into “private litigation” replete with extensive motion practice, discovery and lengthy hearings. Counsel who wish to avoid these problems should consider drafting their reference provision to preclude or at least limit such abuses. For example, counsel should consider limiting the number of depositions and the amount of written discovery. Some limitations, however, may be unrealistic, such as limiting the hearing to a single day for a potentially complex dispute. Limitations of this kind will likely prove unworkable and may result in qualified neutrals refusing to hear the case unless the limitations are removed.

A pre-dispute agreement to use ADR, whether it is an agreement to arbitrate or to use a referee, may be challenged as unenforceable. The most frequent objection is that the ADR provision is unconscionable, particularly in the context of a consumer or employment agreement. There is a plethora of published cases that discuss the enforceability of pre-dispute arbitration agreements. *See, e.g., Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.Ap.4th 638; and *Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159. However, there are comparatively few cases in which courts have considered the enforceability of pre-dispute agreements providing for judicial reference.

In California, there are four recent cases. All of them involved construction defect claims brought against homebuilders in which there was a standardized agreement of purchase and sale that provided for judicial reference. In *Pardee Construction Co. v. Superior Court* (2003) 100 Cal.App.4th 1081, the court refused to enforce the reference agreement; but in *Woodside Homes of California, Inc. v. Superior Court* (2003) 107 Cal.App. 4th 723, *Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, and in *Trend Homes, Inc. v. Superior Court*, 2005 Cal.App. LEXIS 1218 (August 2, 2005), the agreements were all upheld. The cases are somewhat difficult to reconcile, but it appears that the courts may be more inclined to uphold an agreement for reference as opposed to arbitration.

When drafting an arbitration or a judicial reference provision, counsel should keep in mind factors which may limit enforceability. They include: making the reference provision inconspicuous; failing to point out that the parties are giving up their right to a trial by jury; precluding punitive damages; requiring an inconvenient forum; and failing to explicitly state (if it is the case) that the consumer will be responsible for a share of the referee’s fees.

The differences between arbitration and judicial reference lie primarily in the applicability of substantive and procedural law to the decision-making process. In California

⁵ As a quasi-judicial proceeding a hearing before a referee is open to the public. As a practical matter hearings are frequently held in private offices.

“an arbitrator’s decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.” (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6.) Likewise, the rules of evidence and civil procedure that apply to litigation do not apply to arbitration.⁶ Arbitrators normally will admit any evidence that is material.⁷ Evidentiary objections are deemed to go to weight, rather than admissibility. Referees, on the other hand, should conduct the proceedings in the same manner as a court.

Judicial reference also avoids the disclosure rules that apply to arbitrators. Under Code of Civil Procedure Section 1281.9, “...a proposed neutral arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial....” The statute spells out a number of matters involving prior relationships with the parties or their lawyers, and under a recent amendment it also refers to “matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council pursuant to this chapter.”⁸ The requirements of the Code and the Judicial Council are both stringent and exceedingly detailed. Neutrals, or the provider organizations with which they may be connected, may inadvertently fail to make all required disclosures. Nondisclosure requires *vacatur* of the award, even if no one was prejudiced. (Code of Civil Procedure § 1286.2(a)(6).)

Referees, on the other hand, are subject to rules of disclosure and disqualification that are similar to those which apply to judges. Failure on the part of the referee to comply with these requirements may provide grounds for a motion for new trial if the nondisclosure prevented a party from receiving a fair trial. But so long as a fair trial was had, the referee’s decision will stand.⁹

Special Reference

A special reference can be made without the agreement of the parties as specified under section 639. These situations include complex accounting issues or other matters that require special expertise and extraordinary amounts of time to review. In a special reference, the referee will submit findings of fact or recommendations that are advisory in nature. The court may adopt the report in whole or in part. The referee is not authorized to opine on questions of law nor to report on any issues outside the scope of the reference.¹⁰

A special reference can also be made pursuant to the agreement of parties, but consensual special references have limited value because the findings and conclusions of the referee are almost always advisory.¹¹ A special reference should not be viewed as a potential substitute for binding arbitration, even as to specific issues.

⁶ Code of Civil Procedure Sections 1280 et seq. govern the procedure to be followed in arbitration.

⁷ One of the few grounds for overturning an arbitrator’s award is the failure to hear evidence that was “material to the controversy.” See CCP § 1286.2(a)(5). This rule probably accounts for the tendency of arbitrators to admit evidence that a court would exclude.

⁸ See Appendix to California Rules of Court, Division VI.

⁹ Code of Civil Procedure §637.

¹⁰ See *DeGuere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482 at 500-501.

¹¹ CCP §644. The sole exception to the rule that the report of a special referee is non-binding is the “examination of a long account.” *DeGuere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 498.

Special references are frequently used for hearing discovery matters. However, under Rule of Court 244.2(c), a discovery referee may not be appointed at the expense of the parties unless the court makes a finding either that no party has established an economic inability to pay a pro rata share of the referee's fee, or that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee. (For a more detailed discussion of discovery referees see Quinn, How to Succeed with Discovery Referees, *ABTL Northern California Report*, Fall 2004, www.abtl.org.)

Complex Litigation: The Referee as Special Master or Settlement Officer

Under the Judicial Council Standards for Complex Litigation, courts have inherent power to manage complex litigation in the most efficient manner possible. This power includes the use of a referee. Courts have the power to appoint referees in complex cases to assist in resolving discovery matters, even in the absence of a pending discovery dispute. (*Lu v. Superior Court (Grand Lincoln Village Homeowners Ass'n)* (1997) 55 Cal.App.4th 1264, 1269.)

There is no statutory authority in California for the appointment of a special master. Nevertheless, using the reference power of section 639 and borrowing from federal practice, state courts will sometimes appoint special masters in complex litigation. The special master assists the court in the orderly management of a complex case. In addition to managing discovery, the special master's responsibilities may include keeping the case moving toward the scheduled trial date, and otherwise assisting the court with enforcement of the case management order. Under the *Lu* case, courts may also appoint a referee to conduct mandatory settlement conferences.

The Referee as Mediator

California Rule of Court 244.1(b) prohibits the court from appointing a referee to conduct a mediation. Nevertheless courts will sometimes make such appointments under Rule 222 by characterizing the mediation as a mandatory settlement conference. An order of this nature has the effect of compelling the parties to mediate and is a transparent attempt to get around Rule 244.1(b). It also runs contrary to the nature of mediation. Mediation is a voluntary process in which the mediator facilitates communication between the parties for the purpose of helping them to reach an agreement. By compelling parties to mediate, the court ignores the voluntary nature of the process.¹²

A further problem with "mandatory mediation" is the loss of confidentiality since Evidence Code section 1115(b) states that a mandatory settlement conference is not to be considered a mediation. Here again, courts that appoint referees as mediators ignore the nature of mediation, in which confidentiality is essential.¹³

Courts sometimes appoint the same person to act as both a mediator and discovery referee, without actually mandating mediation. These appointments are ill-advised. Confidentiality still can be jeopardized because the mediator is required to wear two hats. Parties to complex litigation may not always understand when they are mediating and when they

¹² In *Travelers Casualty and Surety Company v. Superior Court* (Court of Appeal, Second District B176030, filed February 15, 2005) the court disapproved of "coercive conduct" by a trial judge acting as mediator.

¹³ *Foxgate Homeowners Ass'n v. Bramalea Cal., Inc.* (2001) 26 Cal. 4th 1, 108 Cal. Rptr. 2d 642.

are involved in another activity. Controversies can arise as to whether statements that were made on a particular occasion should be treated as part of the confidential mediation, or whether the mediator was actually acting as referee.

A further problem is that a mediator operates under legal constraints which make it impossible to perform the reporting functions of a referee. In *Foxgate Homeowners Ass'n v. Bramalea Cal., Inc.* (2001) 26 Cal.4th 1, the Supreme Court held that under Evidence Code section 703.5 a mediator may not report to the court on the conduct of any participant in a mediation. Thus the “mediator/referee” may not inform the court of a party’s refusal to comply with a discovery order. Court appointed mediators are also subject to ethical standards that are inconsistent with the duties of a referee.¹⁴ These standards require a mediator to respect the voluntariness of the process and the right of the participants to self-determination. A mediator may not attempt to coerce a party to make any decision or even to continue to participate in a mediation. Referees, on the other hand, are appointed to make rulings and to conduct hearings in which the parties are required to participate.

There also are pragmatic considerations which may make it inadvisable for a referee to attempt to act as a mediator. A referee may at times have to act as a policeman. But a referee who must also mediate may be reluctant to “come down on” a party out of concern for the impact such action will have later during the settlement process.

Conclusion

The use of consensual general reference can be highly effective and should be considered as an alternative to contractual arbitration in any kind of dispute. Referees can also be used to hear specific issues, even if the parties have not provided in advance for a reference, although their decisions are only advisory.

In complex litigation there are special considerations to be kept in mind. It may be necessary to have a referee appointed as a special master, with responsibility for enforcing the case management order, resolving discovery disputes, and conducting mandatory settlement conferences. Parties should not attempt, however, to have the same person act as both a referee and as a mediator.

* Michael P. Carbone is an ADR provider practicing in San Francisco and is a co-chair of the ADR Committee of the Business Law Section of the State Bar of California. He handles cases in many different subject areas, including business and commercial disputes, construction claims and defects, and real estate matters. His website is located at www.mygoodoffices.com.

¹⁴ See *California Rules of Court 1620-1622*, which contain ethical standards for all mediators who have been appointed by the court or who are otherwise covered by the rules.